No. 82-2018

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Petitioner,

—v.—

JUNG JA MALANDRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Plaintiff's brief in opposition does not meet the issue presented by the petition, but seeks instead to circumvent it.

Plaintiff states (Brief for Respondent, p. 8) that "in its opinion the Tenth Circuit panel carefully differentiated between the finding of an excessive award and the finding that such excess was the result of passion and prejudice, a significant distinction which Merrill Lynch ignores." Far from ignoring it, Merrill Lynch denies the validity of this distinction, in the light of this Court's decision in *Minneapolis St. Paul &*

S.S.M.R. v. *Moquin*, 283 U.S. 520 (1931), and the other authorities discussed in the petition. The issue is precisely whether, when a trial marked by emotional outbursts and other courtroom misconduct is followed by an excessive verdict, the court can somehow make a "finding" that the misconduct had no part in causing the excessive verdict.

We respectfully submit that this question should have received its definitive answer from this Court's decision in *Moquin*, an answer which some lower federal courts have unfortunately failed to heed. As the Court there stated, any attempt to determine the extent of the emotional impact of courtroom misconduct on the jury "can be little better than speculation" (283 U.S. at 521). Plaintiff is correct in noting (Brief of Respondent in Opposition, p. 8) that the Tenth Circuit and other Circuits* have, in the years following the *Moquin* decision, developed a line of case law which does sanction such speculation. It is precisely this situation which petitioner urges the Court to correct, in the exercise of its supervisory power.

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* *Kennon* v. *Gilmer*, 131 U.S. 22 (1889), cited by plaintiff (*id.*) as sanctioning the result below, apparently did not involve any claim of actual courtroom misconduct.

CONCLUSION

For each of the reasons set forth above and in the petition for certiorari, this Court should issue a Writ of Certiorari to review the judgment and opinions of the Court below.

Dated: July 26, 1983

Respectfully submitted,

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